IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **00-K-2512**

MICHAEL COLLIGAN,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant.

ORDER ON MOTION TO DISMISS

KANE, J.

Plaintiff brought this insurance action against Defendant UNUM Life Insurance Company of America (UNUM) seeking a declaration of liability and payment of disability benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144, *et seq.* Plaintiff also asserts a Colorado state law claim for bad faith breach of insurance contract, claiming UNUM denied such benefits wrongfully and in bad faith. UNUM moves to dismiss the bad faith claim, arguing it is preempted under § 1144(a) of ERISA as interpreted by the United States Supreme Court in *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987). Plaintiff counters that under the Court's recent explication of *Pilot Life* in *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999), the claim avoids preemption because it is a cause of action that under Colorado law "regulates insurance" for purposes of ERISA's savings clause, 29 U.S.C. § 1144(b)(2)(A). I agree and deny the Motion to Dismiss.

DISCUSSION.

The question presented is whether ERISA preempts claims against insurers for breach of the implied covenant of good faith and fair dealing under Colorado law, or whether, in light of *UNUM*, such a cause of action "regulates insurance" and therefore avoids preemption under ERISA's saving clause, 29 U.S.C. § 1144(b)(2)(A). Under the allegations accepted as true here, the issue is whether an insurance company may refuse to pay a rightful claim for long-term disability benefits in bad faith, but invoke ERISA preemption and its statutory limitations on recovery to avoid accountability to the insured. Based on my review of the history, interpretation and application of the bad faith cause of action against insurers by the Colorado Supreme Court, I conclude that the purpose and effect of the Colorado common law in this area is to "regulate insurance" and the "business of insurance" as that phrase has been defined by the United States Supreme Court in *UNUM*. As a result, Plaintiff's tort cause of action is not preempted by ERISA and may proceed under Colorado law.

The Colorado Supreme Court in *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 443-46 (Colo. 1997) declined to recognize the existence of a tort claim for breach of the covenant of good faith and fair dealing in the employment context while noting that it had long recognized such claims in the context of insurance. In discussing the tort of insurer bad faith as recognized in Colorado, the Colorado Supreme Court reviewed the history of the tort and described its origin and application in much the same terms as the

United States Supreme Court used in *UNUM* to conclude California's notice-prejudice rule "regulates insurance" for purposes of the ERISA savings clause.

> An insurer's tort liability for breach of an implied duty of good faith and fair dealing arises from the nature of the insurance contract as well as from the relationship between the insurer and the insured. *Lira v. Shelter Ins. Col*, 913 P.2d 514, 516 (Colo. 1996); *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984); *see Travelers Ins. v. Savio*, 706 P.2d 1258, 1272 (Colo. 1985). In contrast to a party who seeks to secure commercial advantage in the context of a general commercial contract, an insured who enters into a contract of insurance seeks to obtain 'financial security and protection against calamity.' *Trimble*, 691 P.2d at 1141. Because an insurer's bad faith refusal to pay valid claims defeats the very purpose of the insurance contract, a special duty is imposed upon an insurer to deal in good faith with an insured. *Id.* This 'quasi-fiduciary' relationship between an insurer and an insured is thus based in part on this special contract. *Id.* In addition, when an insured suffers a loss, the insured becomes 'particularly vulnerable' to the insurer. *Savio*, 706 P.2d at 1273 (citing *Bibeault v. Hanover Inc. Co.*, 417 A.2d 313, 318 (R.I. 1980)). For example, an insurer may delay payment of a claim to the insured in the hope of settling for an amount less than what might be due under the contract. Thus the implied covenant of good faith and fair dealing in the context of insurance contract also arises from the heightened reliance necessarily placed by an insured on the insurer. *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987).

Decker, 931 P.2d at 443.

Under the analysis applied in *UNUM*, it is clear the recognition of tort claims for bad faith insurance in Colorado is a rule of law that falls within the ERISA savings clause and is not, therefore, preempted.

Considering the overview in *Decker* and reviewing the Colorado Supreme Court cases

describing the origins and import of Colorado's recognition of a tort law cause of action for bad-faith insurance, those cases accord with the California cases reviewed by the Supreme Court in In *UNUM*, the United States Supreme Court reviewed California case law as supporting a conclusion that Colorado's bad faith cause of action, "as a matter of common sense, regulates insurance" because it is unavailable in other contexts and "govern[s] the insurance relationship distinctively." *UNUM*, 526 U.S. at 372-73 (Ninth Circuit properly determined California caselaw demonstrates state's notice-prejudice rule was one that regulates insurance as a matter of "common sense" because rule was not "merely a routine application of a general antiforfeiture principle," but "mandatory rather than permissive" and "grounded in policy concerns specific to the insurance industry"). Specifically, the Court in *Decker* limited the tort exclusively to the insurance context and recognized that an insurer's good-faith obligation in Colorado is grounded in "special" and "heightened" duties arising "independently" from the those obligations created by the contract generally. *Decker*, 931 P.2d at 443. Because these heightened duties govern the insurance relationship not only distinctively but exclusively, Colorado's bad faith cause of actions, "as a matter of common sense, regulates insurance." *See UNUM*, 526 U.S. at 373.

Further, under the criteria identified in *UNUM* for determining whether a state law regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act, I find the Colorado Supreme Court's recognition that the tort imposes a "special duty" and creates a "special contract" within a contract when an insured suffers a loss "alters the

allocation of risk" for which the parties originally contract and "dictates the terms" of the relationship between the insurer and the insured such that it is "integral to that relationship" as contemplated by the Act. *See UNUM*, 526 U.S. at 373-74 (finding notice-prejudice rule "effectively creates a mandatory contract term" and "dictates the terms of the relationship between the insurer and the insured, and consequently, is integral to that relationship"). Finally, like the Supreme Court in *UNUM*, I invoke the same reasons that support my conclusion that Colorado's bad faith insurance law regulates insurance as a matter of "common sense" to satisfy the third McCarran-Ferguson factor, namely, whether the rule is limited to entities within the insurance industry. *See UNUM*, 526 U.S. at 375 (referring to its determination that the notice-prejudice rule regulates insurance "as a matter of common sense" to conclude the rule is "limited to entities within the insurance industry" for purposes of the McCarran-Ferguson Act's third factor). As the Court concluded in *UNUM* with respect to the California law, I find it clear the cause of action recognized in Colorado for insurance bad faith "'does not merely have an impact on the insurance industry; it is aimed at it.'" *See UNUM* at 375 (citing *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990)).

Based on the foregoing, I conclude Colorado's bad faith cause of action is clearly distinguishable from the Mississippi cause of action at issue in *Pilot Life*, the roots of which the Supreme Court found to be "firmly planted in the general principles of Mississippi tort and contract law." *Pilot Life*, 481 U.S. at 50. Under the Mississippi common law of bad faith, the Court pointed out that "any breach of contract, and not merely breach of an

insurance contract, may lead to liability for punitive damages." *Id.* Colorado's insurance bad faith cause of action, by contrast, is explicitly limited to the insurance industry. *Decker*, 931 P.2d at 443 (the basis for liability in tort for the breach of an insurer's implied duty of good faith and fair dealing is grounded upon the "special contract" arising from the unique and distinct "quasi-fiduciary relationship between insurer and insured" that does not exist in employment or other commercial contracts)(citing *Trimble*, at 1141 and *Savio*, at 1273). *See Lewis v. Aetna U.S. Healthcare, Inc.*, 78 Fed. Supp.2d 1202, 1205, 1209-1214 (N.D. Okla. 1999) (reviewing similar caselaw in Oklahoma under *UNUM* and *Pilot Life* to conclude Oklahoma's bad faith cause of action against insurers, which accords with Colorado's, "regulates insurance" as matter of common sense and "regulates business of insurance" under McCarran-Ferguson factors).

Defendant's Motion to Dismiss Plaintiff's Third Claim for Relief is **DENIED**.

Dated this ___ day of April, 2001, at Denver, Colorado.

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JOHN L. KANE
U.S. SENIOR DISTRICT COURT JUDGE